

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)
) CA No. 01-12257-PBS
PHARMACEUTICAL INDUSTRY AVERAGE) CA No. 06-11337-PBS
WHOLESALE PRICE LITIGATION) Pages 1 - 58
)

MOTION HEARING - DAY TWO

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
January 27, 2010, 10:00 a.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
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12
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P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action 01-12257 and 06-11337, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. HENDERSON: George Henderson, AUSA, for the United States.

MR. LAVINE: Mark Lavine from the U.S. Attorney's office for the Southern District of Florida for the United States.

MR. DRAYCOTT: Justin Draycott, Civil Division, Department of Justice.

MR. BREEN: Jim Breen. I represent the Relator, Ven-A-Care of the Florida Keys.

MR. DALY: Good morning, Judge. Jim Daly for Abbott Laboratories.

MR. TORBORG: Good morning. David Torborg for Abbott Laboratories.

MR. GORTNER: Good morning, your Honor. Eric Gortner for Boehringer Ingelheim and the Roxane defendants.

MR. REALE: Your Honor, John Reale on behalf of Boehringer Ingelheim and the Roxane defendants.

MS. REID: Good morning, your Honor. Sarah Reid on behalf of the Dey defendants.

MS. LORENZO: Good morning. Marisa Lorenzo on behalf

1 of the Dey defendants.

2 THE COURT: I know this is Mr. Daly's favorite topic,
3 so are you starting here?

4 MR. DALY: Yes, your Honor.

5 THE COURT: I thought so. So how are we organizing
6 this? Are you the only one arguing?

7 MR. DALY: I don't know if the codefendants have
8 anything to add, your Honor.

9 THE COURT: There was pretty similar arguments, right?

10 MR. GORTNER: Yes, your Honor. Roxane has a small
11 specific issue with respect to the NovaPlus Red Book CDs that
12 we may like to address at the end of the argument, but I
13 anticipate that the bulk of the argument that we join with will
14 be covered by Mr. Daly.

15 MS. REID: And, again, we anticipate that we may have
16 a very short argument but that Mr. Daly will do the majority.

17 THE COURT: Who's handling it for your team?

18 MR. DRAYCOTT: That would be me, your Honor, Justin
19 Draycott.

20 THE COURT: Okay, that's right, you've been working
21 with these documents for a while here?

22 MR. DRAYCOTT: Indeed, indeed I have, your Honor.

23 THE COURT: All right. So, okay, Mr. Daly.

24 MR. DALY: Good morning, your Honor. Where this
25 motion comes from is, the problem arises because, in our view,

1 the Department of Justice essentially did not lift a finger to
2 preserve documents here from 1995 when this lawsuit was filed
3 until some things that look like document hold memoranda that
4 may have gone out in '04 in another case, not this case, and in
5 '06 and '07, the last two after the government intervened. And
6 so what we have basically is an undisputed record that shows
7 that evidence has been destroyed. Evidence has been destroyed
8 at the federal level within CMS, within OIG, within other
9 agencies of the federal government, through normal -- I mean,
10 not active destruction but, rather, through normal document
11 destruction processes. Documents have been destroyed at the
12 state level in all of the state or in many of the state
13 Medicaid agencies and also with the carriers. And we've seen
14 some of the carrier problems in the Daubert hearing in the
15 sense that we don't have arrays for the vast majority of --
16 actually, we only have arrays for 5 percent of the quarters,
17 and that is because the carriers were not asked to and did not
18 retain the arrays, even though the government is in contract
19 with them and accepted the subpoenas for them. So what we have
20 is a situation with basically undisputed destruction of
21 documents, essentially undisputed prejudice to the defendants,
22 and really the question in my mind, and I think the question
23 for the Court, is what to do about it.

24 And to put it in context very quickly, Judge, I've
25 given Mr. Alba and the Court some exhibits that we've cited in

1 our briefs, and the one I want to spend a little bit of time on
2 just to put things in context is the Tab 3, which is the time
3 line, your Honor. And, very quickly, in the cases filed in
4 June of 1995, beginning in February in '96, the federal
5 government begins its campaign of civil investigative demands
6 and subpoenas to Abbott and others. They begin to gather
7 evidence throughout this time period. In March of 1998, you
8 can see -- and this has been discussed in other contexts, but
9 Ven-A-Care discusses its various allegations in various
10 meetings with the National Association of Medicare Fraud Units.
11 September, '99, the Department of Justice, they're looking at
12 Abbott. They come in and they meet with us, and they give us a
13 dog and pony show telling us that they believe we violated the
14 law, and, you know, ask us to settle all presuit. And they
15 have all kinds of information, all kinds of documents that
16 they've gotten through their one-way discovery that they're
17 negotiating --

18 THE COURT: So that's September to October, 1999?

19 MR. DALY: Yes, your Honor, and --

20 THE COURT: So let me just --

21 MR. DALY: Sure.

22 THE COURT: Assume for a minute I'm not going to rule
23 that the minute a relator files a complaint, that the
24 Department of Justice has any duty to do anything because they
25 have to have a duty of good-faith investigation, see if there's

1 any claim. I mean, I personally see how many nuts file these
2 things, so there's got to be some reasonable investigatory
3 period before they have any duty to do anything. But assume I
4 say that it can be a time before they actually file suit, okay,
5 so there's a spectrum, not right in the beginning, at some
6 point.

7 MR. DALY: Yes, your Honor.

8 THE COURT: So looking at this record, you've
9 represented that you basically were told you were going to be
10 sued in September-October, 1999.

11 MR. DALY: That's right, Judge.

12 THE COURT: So if I were to try and figure out a
13 reasonable point at which a duty to preserve started to kick
14 in, it surely wouldn't be 1995. The government knows nothing
15 about the case at that point.

16 MR. DALY: The standard, Judge, is when it's
17 reasonable to foresee that litigation will ensue. And I think
18 the Court is following the correct analysis. We've got to
19 pinpoint that. I think it's at least by 1999. If your Honor,
20 for example, goes to the very next exhibit, Exhibit 4, it keys
21 into this 1999 date.

22 THE COURT: So can I just say, if I did think that --
23 there's not much case law in the First Circuit on it, so --

24 MR. DALY: On the trigger date? Right, Judge.

25 THE COURT: Duty to preserve -- excuse me?

1 MR. DALY: As to when it kicks in.

2 THE COURT: Yes, or even what that duty is. It's an
3 evolving issue, I think, as people focus more and more on
4 electronic discovery. But let's say it's reasonable to foresee
5 litigation. That seems like a fair enough test. You would say
6 that that was by at least October, 1999. And what drugs were
7 on the table at that point?

8 MR. DALY: All of the drugs that are in suit here,
9 Judge.

10 THE COURT: For Abbott?

11 MR. DALY: For Abbott.

12 THE COURT: So all of the Abbott drugs at that point
13 were in play, if you will?

14 MR. DALY: Yes, Judge. And just to make it perhaps
15 even clearer, if you just look at the next exhibit, Judge, it
16 is an excerpt from a letter from Mr. Lavine, the same
17 Mr. Lavine who's here representing the United States. And this
18 is in response to arguments that we had made about why the
19 government shouldn't sue, and it's written to my partner, Dan
20 Reidy. But what you see is Mr. Lavine responding to our
21 argument saying, "During the course of our investigation, we
22 have become aware of the assertion that the government had
23 knowledge that AWP is not indicative of providers' acquisition
24 costs," et cetera, et cetera, et cetera. So way back in this
25 time period we are telling the government not only that we

1 didn't think that they should sue but what our defenses were.
2 So in terms of what the government understood the claims and
3 defenses to be, in this time period I think it's very clear
4 what is going on, and at this point I think the ball really
5 begins to roll.

6 If you look at the next exhibit, Judge, Exhibit 5,
7 you'll see that the government was also dealing not only with
8 Abbott but with a lot of other defendants during this
9 investigation period. And all of the defendants wrote a white
10 paper to the government talking about, you know, various issues
11 and again trying to convince the government that they shouldn't
12 sue. But those discussions appear to be breaking down, and
13 what this is is the letter written on behalf of defendants
14 where the defendants specifically ask, they say, "Finally, the
15 relator's memorandum states unequivocally that this matter is
16 headed for litigation." So it's clear. And we say --

17 THE COURT: So that date would be August 4, 2000?

18 MR. DALY: 2000, but this is based on discussions that
19 have been going on for quite some time, and the defendants ask,
20 "Nevertheless, we ask that you take appropriate and immediate
21 steps to insure that your client agencies, including at a
22 minimum HHS, HCFA," which is now CMS, "the Medicare fraud
23 control units of the states, state Medicaid officials, and
24 single-payor agencies under the Department of Veterans Affairs,
25 maintain all documents that may be relevant to the subject

1 matter of the claims and defenses."

2 So not only is the federal government telling the
3 defendants what their claims are going to be, but the
4 defendants are responding and saying, "Look, you're going to do
5 what you're going to do. We hope you don't do it, but please
6 preserve the documents." Our defenses are going to be
7 contingent upon being able to get information about, you know,
8 what the government knew, what the government understood, what
9 the government acquiesced in, and whatever -- you know,
10 yesterday we were calling it knowledge plus, Judge -- what the
11 government knew and perhaps acquiesced in at the federal level
12 and also at the state. So the defendants specifically ask. We
13 can't do it. There's been no intervention. The thing is under
14 seal. We have no power to do anything, so we say, "Please,
15 federal government, preserve the documents." But they did
16 nothing.

17 If you go back to the --

18 THE COURT: So if you were to win, though, you know,
19 your point that something should have happened, we could maybe
20 pick 1999 or 2000, but it would be only going forward from
21 there. So, in other words, a lot of the documents that are
22 actually missing are in earlier timetables. When you showed me
23 your great gray sea of missing documents on that chart, aren't
24 most of it -- a lot of it is before that time, right?

25 MR. DALY: Well, a lot of it's before that time, but

1 the question being, Judge, let's take 1999, for example, if
2 that's the date you picked. We don't know if in 1999 if they'd
3 asked the state Medicaid agencies, "Give me your claims data
4 going back to 1991," they might have had it. So it's not the
5 date of the document; it's what they would have had on the date
6 that you feel they had a duty to preserve.

7 THE COURT: Well, do I have anything in this record
8 about what they would have had if the demand had been made,
9 let's say, when you made the demand in August, 2000?

10 MR. DALY: I think all we have is that when the
11 requests were made by the federal government and the states and
12 the defendants once the litigation had started, the data was
13 not available. I don't know that particular dates of
14 destruction for that material --

15 THE COURT: And the requests were made in 2004? When
16 did the preservation start?

17 MR. DALY: It was unsealed in 2006, Judge.

18 THE COURT: Right, but your argument is that until it
19 was unsealed, there was no request -- I think there was an
20 earlier request, wasn't there, from the Department of Justice?
21 2004, right?

22 MR. DALY: Judge, and I'm prepared to talk about that.
23 That's on the chronology too.

24 THE COURT: Yes.

25 MR. DALY: And if you look, we go from this 2000

1 letter where we ask them to preserve documents to 2004, and
2 what that is, that's a hold memo that the government sends out,
3 not in our case but in the class action that also your Honor
4 has as part of 1456. Remember, the defendants there subpoenaed
5 the federal government for some documents, and in connection
6 with that -- only to CMS, by the way, not to OIG or any other
7 federal agencies or any states or any carriers -- the
8 government issued a hold memorandum, which we do not have.
9 We've asked for copies of it. We have a redacted copy. We
10 asked counsel for the government to bring it to court today.
11 We'd very much like to see what they actually asked anybody to
12 hold. We don't know because they blacked it out. So that's
13 the first thing. We don't know what it is. We do know that it
14 only went to CMS.

15 And so the next thing to happen is '04 to '07, '06 is
16 that the U.S. intervenes in March of 2006. In November of 2006
17 on the chart there, in an interrogatory response, the
18 government says that "We instructed the state Medicaid agencies
19 to maintain and preserve documents." No detail is given. We
20 don't know if it was a letter. We don't know if it was an
21 e-mail. We don't know what they asked. We don't know who it
22 went to. We don't know anything. We've asked again that that
23 communication be brought to court today. I don't know whether
24 counsel has it or not, but we think it's important. It's
25 important for a couple of reasons: One, it's the first time

1 that the state agencies are asked to hold documents, and it's
2 also proof that the government can do it. The government has
3 the authority to ask the states to hold these documents, and we
4 know that because they did it.

5 And then the next thing that happens is, the first
6 litigation hold is issued in 2007, and, again, that's a
7 document that we have the to/from, but the guts of it -- in
8 other words, what people were asked to hold -- has been
9 redacted, so we don't know exactly what anyone has been asked
10 to hold.

11 And so what you have, and if you look at the bottom of
12 the chart, Judge, what's going on here is that for eleven years
13 before this thing was unsealed, the government, according to
14 its own documents, according to its extensions that they filed
15 with the court in Florida seeking extension after extension,
16 eleven years' worth of extensions, what they told the judge
17 they were doing was having a nonstop agenda on drug pricing,
18 including meeting with states, aggressively pursuing settlement
19 discussions, creating an electronic database for storage and
20 review of thousands of documents. They're using this time to
21 create documents the whole time, not preserving anything, and
22 then they also issue --

23 THE COURT: What date was that on that they told the
24 judge that?

25 MR. DALY: Judge, those are attached to our brief. I

1 don't have the date handy. It's all of their extension
2 requests that they made in front of Judge Gold.

3 THE COURT: I see.

4 MR. DALY: Because they were telling the judge why
5 they need more time. And so while they're doing all this, the
6 states, you know, they have no idea what's going on, and
7 they're not being asked to and do not preserve any documents,
8 so all of this is gone.

9 So let me jump to a discussion of what's lost, and,
10 first of all -- and I think the Court asked a good question --
11 we can't tell what was lost, in other words. And there's a lot
12 of case law on this generally, maybe not from the First
13 Circuit. Like, Judge Bowler has written an opinion on it.
14 But, you know, we can't be saddled with having to tell you
15 what's lost and exactly when it was lost, and if something had
16 been done in 1999, would that document still have been there?
17 We don't know. The problem is that if that burden were flipped
18 onto the defendants, you'd have a situation where the
19 defendants are in a catch-22. You can't tell what's out there,
20 and so trying to force them to explain why it would be relevant
21 and what it is is something that the case law suggests is not
22 something that's appropriate to do.

23 So we have this great unknown of things that were out
24 there, that could have been out there, that we believe have
25 been out there, because when we've been able to do discovery --

1 and it's not every state, Judge, that doesn't have documents.
2 The litigating states, for example, have documents, and we've
3 been able to get documents from some of the states that we're
4 in litigation with because they've issued their own hold
5 memoranda and they have their own lawyers who are pursuing
6 claims. Illinois, for example, has produced tens of thousands
7 of documents, and we have good evidence about what Illinois
8 knew and understood and acquiesced in and what their policies
9 are. If you look at other states, Oklahoma produced ten
10 documents. We gave them a document request and subpoena, and
11 it's a broad situation. It's asking for all the things that
12 the Court would expect us to ask for: What's your policy on
13 AWP? What did you understand? What about cross-subsidization?
14 Did you have a policy of X, Y, and Z, blah-blah-blah, going
15 back throughout the claim here? Oklahoma has ten documents.
16 Some states had no documents for the time period because all of
17 that stuff has been destroyed.

18 So when the Court was looking at this yesterday and
19 talking about state by state, I want to spend a minute on that
20 because when we started the summary judgment process here, we
21 were operating under the assumption based on what we thought
22 the law was and some comments of the Court that government
23 knowledge or knowledge plus is in play, not only for scienter
24 but also for causation, and maybe falsity; and I think, at
25 least as to causation, I think the Court was talking about that

1 as a possibility yesterday as well. So when we moved, we
2 didn't move on a state-by-state basis. We didn't move on
3 government knowledge at all. So when the defendants came in --

4 THE COURT: Well, no, because you think there's a fact
5 dispute.

6 MR. DALY: Right, but the government didn't move on a
7 state-by-state basis either. Their motion is: This evidence
8 of what states knew or understood, it doesn't matter, it's all
9 irrelevant. It's the same argument that they've been making --

10 THE COURT: Right, but I don't have to -- both sides
11 have taken polar extreme positions, and that's understandable.
12 I don't have to -- there is something in between.

13 MR. DALY: There is something in between, Judge, but
14 the problem with some of these states is that we have zilch
15 from them. We went out and took their depositions, deposition
16 after deposition, 30(b)(6) depositions. And they'd bring in
17 people who had only been there a couple of years, and we'd ask
18 them about all these questions going back in time, and they had
19 no idea, they had no information, they were unprepared, there
20 were no documents. This is deposition after deposition.

21 Now, there are a lot of states where we do have it,
22 and these are set forth in our papers, and I would recommend,
23 Judge, we have three appendices to our brief. They're attached
24 to it. It's A, B, and C. And what they do is, they go through
25 a lot of the information. There's a package of compiled

1 deposition testimony of 30(b)(6) witnesses from the state who
2 didn't know anything. There's a compilation of witnesses from
3 the states who come in and say, "Sorry, we don't have any
4 documents. I can't go back and recreate this. I don't know
5 what our policy was. That person is gone. Did you talk to
6 anybody? No." They come in time after time after time in
7 these depositions and don't give us any information. So when
8 the Court is thinking about what does this look like on a
9 state-by-state basis, I just wanted to say, A, we've got a lot
10 more information than eight states in our briefs about states
11 where the evidence we think is very strong about what the
12 policy is, but a lot of them we have nothing.

13 THE COURT: Eight you've highlighted about.

14 MR. DALY: Well, yes, that might just be some bullet
15 points in the briefs --

16 THE COURT: I forget the number but --

17 MR. DALY: There's many more in the briefs. But there
18 are also many states -- and, really, the more documents that
19 they've produce, the more documents they happen to maintain,
20 the more we have to say about them because the Court knows as
21 well as anybody here does that it's one thing to depose an
22 individual when you have a document to sort of lock them in, it
23 might be their document, something that they have to respond
24 to, versus having no documents and having to ask people, "What
25 was the policy?" They all say, "We don't know."

1 THE COURT: So assume, which I'm not right now, that
2 I'm going to pick some point in time where there was some
3 obligation to preserve, but it's not going to be 1995, you're
4 asking me to essentially do what?

5 MR. DALY: Judge, I think there ought to be -- well,
6 if you want to talk about remedy?

7 THE COURT: Yes, let's assume I don't agree with you
8 it's 1995.

9 MR. DALY: Okay.

10 THE COURT: I guess the first hold is 2004. I'm sure
11 the government is going to take the position that that's
12 enough. But let's assume I pick, let's say, when you made the
13 demand, August 4, 2000, or 1999. It probably wouldn't be
14 before then. So then what? You're not asking me to dismiss
15 the case, are you?

16 MR. DALY: No, Judge. I mean, I think that's an
17 option, but we're not asking for that.

18 THE COURT: So what are you asking for?

19 MR. DALY: Judge, in terms of a remedy, we think that
20 a couple of things would be appropriate. First of all, I think
21 it goes to this issue of the Medicare and Medicaid claims data.
22 We do think this is a very serious problem. We spent -- I'm
23 not going to go into detail at all. We spent last week on the
24 Daubert hearing. The gray areas on our charts -- and the
25 charts are in our book if you wanted to look at them again, but

1 the notion here is that had the government done something about
2 this back in 2000 or 1999 or earlier, there's a very good
3 chance that that information would be here. The only reason
4 that it's not here is that they didn't do anything about it, so
5 the fact that --

6 THE COURT: Can I press you on that a little bit?

7 MR. DALY: Yes.

8 THE COURT: Certainly that would be true if we were
9 talking about CMS data because that's the federal government,
10 but in fact it's been represented they mostly have that. So
11 we're really talking about the carriers and potentially the
12 states. So I've not really heard a serious argument that
13 there's a big hole in the federal data as opposed to the
14 carriers where there's a huge amount of --

15 MR. DALY: Data, right.

16 THE COURT: -- data. So it's not a hundred percent
17 clear to me that they would have had the right to come in and
18 order the carriers to hold it. In other words, I don't know
19 the answer to that.

20 MR. DALY: Well, the carrier relationship with CMS,
21 Judge, is a contractual one. I mean, they process the claims
22 for CMS. That's their job. They have a contractual
23 relationship. When we wanted to take discovery from the
24 carriers, the government said, "No, no, no, you've got to work
25 through us. We'll go get that." So I don't think there's --

1 THE COURT: So you think it's at least reasonably
2 within their control?

3 MR. DALY: Right, really, no question from my
4 perspective.

5 THE COURT: From the states, which are separate
6 sovereigns, that's a -- in some ways it's easier for the
7 government because there's a regulatory scheme and in some ways
8 harder simply because they're separate sovereigns.

9 MR. DALY: With respect to the states, Judge, you
10 know, the Court knows as well as we do, I think, the Medicaid
11 program is a joint operation between the federal government and
12 the states. The federal government --

13 THE COURT: I don't know that the federal government
14 can order the states to do it.

15 MR. DALY: Well, there is authority, and we cite it in
16 our brief, and I can find it for you in a minute, Judge, but
17 they do have the authority to demand that they retain records.
18 The federal government writes the checks here, so if the
19 federal government were to say, as they did --

20 THE COURT: So your argument would be, even if it
21 wasn't the federal government's records, they had reasonable
22 control over the retention policies?

23 MR. DALY: Yes, and we know that because they did it.
24 They say they did it in 2006, and this is the interrogatory
25 response, and we'd really like to know what they asked them to

1 do. But sort of the proof is in the pudding on that one, Judge.
2 Not only could they but they did, and we asked them to do
3 this --

4 THE COURT: So as a sanction, what you're really
5 asking me to do here is to in some ways, to the extent there is
6 a doubt about damages within time periods when this should have
7 been preserved, basically instead of precluding damages for
8 those times --

9 MR. DALY: For those periods where they lack --

10 THE COURT: So that's what you're really asking for?

11 MR. DALY: Yes, Judge, where they don't have the
12 arrays which they could have gotten and the carriers could have
13 had had they acted, you know, six or seven or eight years
14 earlier, and the states where they don't have state-produced
15 claims data.

16 I do have one more important remedy that we do seek,
17 Judge, which I think is important and actually comes a little
18 bit out of yesterday's discussion. I'm not sure where the
19 Court is going to come out. We're talking about burden, who
20 has the burden on whether government knowledge plus, as the
21 Court called it yesterday, is something that goes to causation,
22 which is an element of the defense --

23 THE COURT: My law clerk and I were actually
24 struggling with this. Is it an affirmative defense that
25 negates liability, or is it a second thing that comes in

1 altogether? It's doctrinally, actually, a curious concept. I
2 actually was thinking about that again last night: Does the
3 government prove up liability, and then you can defeat it
4 through an affirmative defense, or does essentially the
5 affirmative defense cut off causation or scienter? I suppose
6 it depends.

7 MR. DALY: Right. And we also think, Judge, that it
8 also is a notion that goes to the element of the government's
9 case. In other words, because it affects causation, not as an
10 affirmative defense against causation but as an element of
11 their claim, I'm not sure who ends up with the burden here.
12 But one of the things that the cases do in the world of burdens
13 is to say, look, when the evidence is not there, when you have
14 great swarths of evidence that is just simply gone and
15 unreachable, that it's perfectly appropriate to put the burden
16 on the party who engaged -- not engaged but allowed the
17 spoliation to occur.

18 THE COURT: Well, thank you. That's very useful. I
19 get the gist. So it's primarily at this point, anyway, a
20 damages sanction that you're seeking?

21 MR. DALY: Yes, Judge. And then also, and that would
22 follow up, keeping with my second point, if appropriate, there
23 might be an adverse inference jury instruction that might be
24 appropriate, depending on --

25 THE COURT: Well, I won't get there yet. Okay, thank

1 you.

2 MR. DALY: Thank you, Judge.

3 THE COURT: Okay, you've lived and died these
4 arguments now.

5 MR. DRAYCOTT: That is true, and knowledge of what has
6 been produced and what is in this record leads to a conclusion
7 that there is absolutely nothing that has been destroyed.

8 Mr. --

9 THE COURT: We know the carrier records, the arrays
10 aren't there.

11 MR. DRAYCOTT: But, your Honor, they haven't been
12 destroyed.

13 THE COURT: Well, where are they?

14 MR. DRAYCOTT: If there's an array that defendants
15 want to have, it's because if there's missing documents at this
16 point --

17 THE COURT: Well, we know there are. That's what the
18 expert said. That's why we need to talk about extrapolation.

19 MR. DRAYCOTT: No, your Honor. There may be documents
20 which have not been produced, the carriers' archived materials.
21 From the earliest point in this case, the United States
22 recognized that there was going to be a burden of production
23 here, and there's been an enormous burden across all the
24 discovery requests that have been made.

25 THE COURT: Wait a minute, wait a minute.

1 MR. DRAYCOTT: And the defendants knew at a very
2 earlier time --

3 THE COURT: You're saying these documents actually
4 exist?

5 MR. DRAYCOTT: There could be carrier arrays out
6 there --

7 THE COURT: No, no, no. You must know this. Did you
8 go out and call the carriers, "Do they exist?" because I don't
9 want to play this game with the extrapolation if the documents
10 are out there.

11 MR. DRAYCOTT: What I'm telling your Honor is, there
12 are materials, including arrays, for which a search was never
13 done based on the burden, and that's been known to the
14 defendants in this case from the outset of this litigation. So
15 there is material. There is carrier arrays that could be in
16 archived carrier material for which no search was undertaken,
17 and the government made very clear that it was not going to
18 incur the burden, and it was not going to direct the carriers
19 to look for certain classes of material.

20 THE COURT: All right, let's go backwards because
21 we're starting in the middle here. You actually didn't
22 disagree so much in your briefs as to what the standard was.
23 What's the standard for when you have a duty to preserve
24 documents?

25 MR. DRAYCOTT: Certainly, your Honor, when litigation

1 is reasonably foreseeable, there's --

2 THE COURT: All right, you agree with the standard,
3 when litigation is reasonably foreseeable. So when do you
4 think litigation was reasonably foreseeable?

5 MR. DRAYCOTT: Your Honor, we have not addressed that
6 issue because the main reason being that there is no point at
7 which documents weren't being preserved. There is never a
8 point where documents were being destroyed.

9 THE COURT: Excuse me. I want to understand this.
10 I'll get to that in a minute. At what point do you think
11 litigation was reasonably foreseeable? Would 1999 or 2000 be
12 the period of time?

13 MR. DRAYCOTT: Certainly in 2004 there was direction
14 from the Department of Justice in this MDL to preserve.

15 THE COURT: Right, so you're at 2004, at least. It
16 struck me in reading some of these that it was reasonably
17 foreseeable in either 1999 or 2000.

18 MR. DRAYCOTT: Certainly with respect to these
19 defendants.

20 THE COURT: Yes. Oh, that's what I'm talking about.

21 MR. DRAYCOTT: So in 2004.

22 THE COURT: Right. Now, I'm saying in 1999 or 2000,
23 it looked reasonably foreseeable.

24 MR. DRAYCOTT: I think --

25 THE COURT: You were meeting with them. Mr. Lavine, I

1 guess, was meeting with them. They were saying it looks
2 foreseeable. The relator was saying it looks foreseeable.

3 MR. DRAYCOTT: I wouldn't say it was seen as
4 foreseeable. I would more say that it was possible. Certainly
5 we were aware of potential claims. Whether or not we'd end up
6 in litigation -- I mean, but there were a lot of other
7 defendants in these qui tams for which we were also having
8 discussions with.

9 THE COURT: Excuse me. Maybe. I'm now talking about
10 these guys, okay. So it's possible that for others, it was an
11 outlier. For these people, is it disputed factually that it
12 wasn't reasonably foreseeable in 2000, 1999, 2000?

13 MR. DRAYCOTT: If I can have the Court's indulgence.
14 Because that predates my involvement in the case, I'm going to
15 consult with my colleague very briefly?

16 THE COURT: Yes. I mean, it was noticeable from your
17 brief that I didn't get a response to that contention.

18 (Discussion off the record between government
19 counsel.)

20 MR. DRAYCOTT: It would be difficult to conclude that
21 it was reasonably foreseeable in 2000. Certainly we hadn't
22 advised them that we were going to sue. We advised them of the
23 pendency of potential claims. But if you're asking me to
24 concede that it was reasonably foreseeable in 2000, it's hard
25 for me to conclude that it was based on this record. But I

1 would -- for the record, I would -- what I can go is to the
2 2004 date and reasonably foreseeable --

3 THE COURT: Well, do you say it was reasonably
4 foreseeable in 2004?

5 MR. DRAYCOTT: The point at which it becomes
6 reasonably foreseeable is when we actually have the authority
7 to sue and --

8 THE COURT: No, no, I'm not accepting that as a date,
9 okay, because I've had this running beef with the Department of
10 Justice, a running beef with them, not just about this case,
11 believe me, many cases that it goes on and on and on. At some
12 point short of suing, it becomes reasonably foreseeable.

13 MR. DRAYCOTT: For the purposes of this motion, I'll
14 concede to you 2004.

15 THE COURT: Okay. All right, so I don't know where
16 I'm going to pick, but let's even pick 2004. I'm not going to
17 take 1995. I think that's crazy. I see so many nutty relator
18 cases. You can't say, just because a relator files one of
19 these things, it's reasonably foreseeable. Okay, so you've got
20 to shift through it, triage it. So at some point, and given
21 resource issues at the Department of Justice, you know, it's
22 fairly two or three years to investigate one of these things --

23 MR. DRAYCOTT: I absolutely understand your Honor's
24 interest. Can I just be clear. My only pushback is because
25 our focus so much is that there was never destruction.

1 THE COURT: Okay, let me get to that. So let's assume
2 I pick 2004, I pick your date, what's the -- and I'm just
3 asking. There's almost no case law on this, okay, a couple of
4 unpublished District Court cases. You know, there's very
5 little out there and no First Circuit standards, so I'm sort of
6 curious. So what does the Department of Justice view its
7 obligation, let's say 2004, once it thinks that it's reasonably
8 foreseeable?

9 MR. DRAYCOTT: It would be to suspend any destruction
10 of potentially relevant material that would occur absent a
11 litigation hold directive.

12 THE COURT: And do you agree with Mr. Daly that in the
13 context of this case, that would extend to the state
14 governments?

15 MR. DRAYCOTT: No, absolutely not, your Honor.

16 THE COURT: Even when you're seeking your Medicaid
17 share?

18 MR. DRAYCOTT: Correct.

19 THE COURT: Why?

20 MR. DRAYCOTT: Because we just don't view ourselves as
21 having authority over another sovereign to do that. We can
22 make a request, and what we've done certainly in 2006 was, a
23 request was made by the Department of Justice and a suggestion,
24 but neither the Department of Justice nor the agency views
25 itself as having the authority to direct states to preserve

1 evidence.

2 THE COURT: So do you have a copy of what you actually
3 did with the states? Did you do whatever you do in 2004 with
4 the states?

5 MR. DRAYCOTT: Okay, let me back up. I want to answer
6 your Honor's questions. Certainly I have the copy of a letter
7 from Mr. Henderson in addition to another individual in 2006
8 requesting states to preserve. But your Honor should also
9 understand that the reason there's not much of a record on this
10 is, the issue of the federal government's obligation to the
11 states really wasn't a subject of discovery or an issue that
12 was pursued by the defendants really until very late in the day
13 when the issue of spoliation came up.

14 THE COURT: I'm just trying to understand it.

15 MR. DRAYCOTT: Right, and that's why --

16 THE COURT: I want to understand what the Department
17 of Justice did here. At what point did they ask the courts to
18 hold onto its claims data?

19 MR. DRAYCOTT: The states?

20 THE COURT: And documents?

21 MR. DRAYCOTT: And, again, what I'm trying to be is
22 very accurate. Certainly it was done in 2006. Now, prior to
23 that time, certainly the Department of Justice was working with
24 state Medicaid fraud control units, state Attorney Generals'
25 offices. Those would have been many times telephone

1 conversations. There was some coordination. And so I can't
2 represent to you, because I don't know, everything that
3 happened in the context of that relationship, which goes back
4 certainly prior to 2006. So I don't want to say affirmatively
5 to your Honor that absolutely nothing was done, you know, in
6 these conversations or meetings between various members of the
7 Department of Justice and states. But in terms of the record
8 that's before you now, the only thing that I can put in front
9 of you and point to is going to be a 2006 request from
10 officials of the Department of Justice, but I'm not -- what I
11 want to be careful about saying is, I'm not suggesting to you
12 that that's the only thing that happened --

13 THE COURT: All right, so that's what I've got in this
14 record, and that's where it's sticking, so --

15 MR. DRAYCOTT: That's what you've got in this record.

16 THE COURT: So but you would say you did not have the
17 authority to put a litigation hold on the state records?

18 MR. DRAYCOTT: Correct, your Honor.

19 THE COURT: All right. And what about the carriers?

20 MR. DRAYCOTT: Well, the carriers were certainly
21 covered by the directives that went out in 2004 and at other
22 times, but, again, the carriers --

23 THE COURT: What went out in 2004, a letter to the
24 carriers?

25 MR. DRAYCOTT: Well, that's a matter that's in the

1 record now. I'd need to go back and go through the various
2 directives, but, again, the carriers are required to archive
3 their material.

4 THE COURT: Forever?

5 MR. DRAYCOTT: Virtually, yes. There are specific
6 archival requirements, which is where the burden comes in.

7 THE COURT: All right, so it's clear that the state
8 data is missing, right? Now, you'd say it's not your fault,
9 but --

10 MR. DRAYCOTT: Well, no, I don't know in terms of
11 missing --

12 THE COURT: Well, I was told by Dr. Duggan that he
13 didn't have state claims data going back to a certain period of
14 time.

15 MR. DRAYCOTT: But there's two issues there, your
16 Honor. One is, do the states have it, or has it been obtained
17 in this litigation? And the first thing I'd say to your Honor,
18 the state of the data to a large extent is reflective of the
19 litigation strategy by defendants. The idea that they would
20 actually, the state data would be acquired --

21 THE COURT: I thought they said in 30(b)(6)
22 depositions they asked, and people couldn't find any documents
23 or data, and I thought Duggan told me the data wasn't there.

24 MR. DRAYCOTT: The data has certainly not been
25 available to Dr. Duggan. The question is, why is that?

1 THE COURT: Well, tell me flat out, is it there?

2 MR. DRAYCOTT: I think we don't know what the full
3 extent of the state data is, certainly where it's been
4 subpoenaed and states have complied, and that occurred fairly
5 late in this litigation --

6 THE COURT: Well, have states been subpoenaed, and
7 they say, "We don't have it anymore"?

8 MR. DRAYCOTT: I think a number of states have. I'm
9 not sure that every state has been subpoenaed, but it's been an
10 issue. This is a --

11 THE COURT: Well, can you put into the record which
12 ones where it was actually subpoenaed and they don't have it
13 and which ones we don't know?

14 MR. DRAYCOTT: Largely, a lot of the subpoenas that
15 were issued were actually issued by defendants, which is the
16 direction that your Honor gave.

17 THE COURT: All right, so if I told the defendants to
18 disclose to me what subpoenas they sent out --

19 MR. DRAYCOTT: And what the level of compliance is, I
20 think that's a fair question.

21 THE COURT: And I can say that if they didn't get any
22 back, I can reasonably infer it doesn't exist, short of the
23 states committing fraud.

24 MR. DRAYCOTT: Well, I think, again, if this was the
25 critical data that defendants now assert that it is, they

1 should have been pursuing this data at a much earlier time in
2 this litigation, should have been --

3 THE COURT: Excuse me. You know what? I don't want
4 to play games on this. If they subpoenaed the documents and
5 the states said they didn't have it, the claims data, which we
6 all know existed, wouldn't it be reasonable for me to infer
7 that they don't have it anymore because they say they don't
8 have it?

9 MR. DRAYCOTT: I promise you, your Honor, that I'm not
10 trying to play games with you, but --

11 THE COURT: Why isn't that true?

12 MR. DRAYCOTT: But if a state asserts objections to
13 the subpoena based on burden, then I'm not sure, frankly, your
14 Honor, that conclusion would be fair.

15 THE COURT: Fine, but if they say they don't have
16 it --

17 MR. DRAYCOTT: Then I would agree, your Honor.

18 THE COURT: -- then they don't have it.

19 MR. DRAYCOTT: I would agree. If they say -- if the
20 response to the subpoena is not that we're not going to produce
21 it or it's too burdensome but simply we have nothing to produce
22 to you, then I would agree with you.

23 THE COURT: All right. So, now, what if -- are you
24 saying -- and maybe if you don't know now, I want you to go
25 look. What I have to go through with Dr. Duggan is unfortunate

1 because it would be so much easier if I actually had the claims
2 data like I do for Illinois. So you're saying you all didn't
3 go back and ask the states if they had it going back?

4 MR. DRAYCOTT: I think that's initially correct, that
5 we were looking at relying on federal data as a damage model.
6 Now, there's been a shift in that, but, again --

7 THE COURT: Excuse me. Did you go out and ask all the
8 states for their data, claims data in the context of putting
9 together damages or a defense on the government knowledge
10 thing, I suppose?

11 MR. DRAYCOTT: Can I have the Court's indulgence for
12 one second?

13 THE COURT: Yes.

14 MR. DRAYCOTT: Your Honor, if I can just take one
15 quick break, which is, I have been less immersed in the claims
16 data issue, if I can ask Mr. Henderson to address this issue --

17 THE COURT: Sure. And if you don't know, fine. It's
18 a huge piece of litigation. I'll let you supplement. I just
19 need to know the facts.

20 MR. DRAYCOTT: I think I can get the answer from
21 Mr. Henderson.

22 THE COURT: Yes, Mr. Henderson, do you ask the states
23 for the data going back to 1991 or whenever it is you're
24 seeking damages?

25 MR. HENDERSON: No subpoena was issued to any state.

1 We --

2 THE COURT: By you?

3 MR. HENDERSON: By the federal government.

4 THE COURT: All right, by the federal government.

5 MR. HENDERSON: No subpoenas. Requests were made on a
6 prioritization basis focusing on states with the highest
7 spending, in accordance with Dr. Duggan's recommendations.
8 Those were requests only. A number of states said, "We've got
9 stuff that's archived that's inaccessible because it's in a
10 different format, and we're not going to produce it," or that
11 it was -- some states refused. Some states said, "No, we're
12 just not going to produce it, period." Some states, "We'll
13 give you what's readily available," and some --

14 THE COURT: Did anyone tell you it was destroyed?

15 MR. HENDERSON: Not that I recall.

16 THE COURT: Okay, so, to the best of your memory --
17 and if you want, you can go back and review your notes after
18 this hearing -- no state said to you that they don't exist
19 anymore?

20 MR. HENDERSON: I just don't recall, your Honor. I
21 couldn't make that representation. So I don't know.

22 THE COURT: As you stand here right now, do you
23 remember any state telling you it was destroyed?

24 MR. HENDERSON: I am aware now that for a state that
25 we didn't request information, that they don't have it. So I

1 can't say that all of that data out there exists. I, frankly,
2 suspect there's some states, at least some states where some
3 data going back to 1991 has been destroyed.

4 THE COURT: But you don't know as you stand here?

5 MR. HENDERSON: But I don't know. I can't -- I know
6 the state of Mississippi, for example, recently came to us and
7 asked us for help getting CMS data because they did not have
8 historic claims data, but that wasn't a state that we
9 approached.

10 THE COURT: So for every state you approached, they
11 had the data going back to 1991?

12 MR. HENDERSON: No. Well, they didn't produce that
13 data.

14 THE COURT: But I'm just trying to say, did they have
15 it, and then they said, "Hey, jump in a lake. We're not going
16 into our archives for this"?

17 MR. HENDERSON: We didn't record -- I can't say. I
18 don't know.

19 THE COURT: Okay, so the state of the record is --

20 MR. HENDERSON: A lot of our --

21 THE COURT: Excuse me. The state of the record is,
22 you don't know. You know that you asked certain states and --

23 MR. HENDERSON: The process --

24 THE COURT: Excuse me. You asked certain states. You
25 got certain data. Sometimes the state refused. Sometimes they

1 said it was archived. Maybe some states like Mississippi said
2 that they've been destroyed, that you basically have no record
3 state by state as to what the responses were.

4 MR. HENDERSON: We don't have a reliable record, your
5 Honor.

6 THE COURT: Well, I will ask you to go back through
7 your files and see if you can reconstruct. If you can, you
8 can. If you can't, that's the state of the record.

9 Okay, so when you say -- your basic defense to this
10 is, "Well, maybe we had to preserve in 2004, or maybe we had to
11 preserve in 2000, but the reason this fails is, they haven't
12 proven that any documents were actually destroyed"?

13 MR. DRAYCOTT: I think that's a key point to our
14 defense. It's absolutely right, your Honor. And while
15 Mr. Daly said that was undisputed, it's vigorously disputed,
16 and in fact what --

17 THE COURT: Well, we know Mississippi is, at the very
18 least, right?

19 MR. DRAYCOTT: Well, let me back up. I think it's
20 helpful what your Honor is now doing to sort of categorize what
21 the spoliation motions pertain to, and I think the state
22 information is in a very distinct category, and our principal
23 defense would be that there is -- that where the custody and
24 control of that information is with the sovereign state, that
25 the preservation obligation goes no further than the production

1 obligation. And when your Honor directed at an early point in
2 this case for defendants, if they wanted that information, to
3 subpoena it from the states, it's because your Honor recognized
4 that it wasn't a production obligation that extended to us.

5 THE COURT: Now, with respect to the carriers --

6 MR. DRAYCOTT: The carriers, okay, again, I think it's
7 helpful to focus on that --

8 THE COURT: I'm doing this in the weeds. So what
9 about the carriers? Did you send a preservation letter to the
10 carriers?

11 MR. DRAYCOTT: Yes, we did, your Honor, but --

12 THE COURT: When?

13 MR. DRAYCOTT: And again I'm going to have to
14 supplement on that, or at a break I can probably get you when
15 the carriers would have obtained --

16 THE COURT: We're going to finish this because we're
17 almost done, right?

18 MR. DRAYCOTT: That's right. No, it's going to be
19 readily accessible. I don't have it off the top of my head,
20 your Honor.

21 THE COURT: So in the 2004 time framework?

22 MR. DRAYCOTT: Yes, I think that's correct.

23 THE COURT: All right, so you sent a letter to the
24 carriers to preserve?

25 MR. DRAYCOTT: That's correct.

1 THE COURT: Going back to the beginning, 1991?

2 MR. DRAYCOTT: Again, I'm going to have to go look for
3 that. There's been a lot of preservation directives that have
4 been issued via CMS, so I've got to focus on the one to the
5 carriers. I can get your Honor that.

6 THE COURT: To your knowledge, nothing has been
7 destroyed going back to 1991? You just haven't gone after it?

8 MR. DRAYCOTT: That's exactly right.

9 THE COURT: Because you feel like you can just rely on
10 this extrapolation?

11 MR. DRAYCOTT: Well, we've gotten some information.
12 We went to one carrier, and we -- and I think this was
13 described by Dr. Duggan where the arrays were from one carrier.
14 I think that's correct.

15 THE COURT: So let me ask you this: If I end up
16 concluding that there's not enough to extrapolate for certain
17 periods of time, are you going to go back to these carriers and
18 get these documents?

19 MR. DRAYCOTT: No. I mean, I think we've, if you
20 will, we've made our bed, and we have to lie on it. But I
21 think, your Honor, you're right in looking at it as a Daubert
22 or an expert issue, if a jury were to conclude that we don't --
23 that Dr. Duggan didn't have enough information to make the
24 extrapolations, but we contest the idea that it should be
25 resolved as a spoliation issue when throughout this

1 litigation --

2 THE COURT: In your view, it still exists?

3 MR. DRAYCOTT: It may very well still exist, your
4 Honor.

5 THE COURT: All right, let me jump over here then.

6 MR. DRAYCOTT: We did not incur that burden, and we
7 did not put the carriers to that burden, nor did --

8 THE COURT: Nor did they move to compel.

9 MR. DRAYCOTT: Nor did defendants with full knowledge
10 of what was not being searched compel us to do that.

11 THE COURT: So you're saying, "Yes, we have a duty to
12 preserve. We think the date is 2004, no earlier than 2004, but
13 none of that matters because the data for the most part still
14 exists"?

15 MR. DRAYCOTT: It may well. We've certainly not
16 undertaken to --

17 THE COURT: They haven't shown it's been destroyed.

18 MR. DRAYCOTT: Correct, your Honor.

19 THE COURT: Okay. What do I do with that? Have you
20 subpoenaed the carriers?

21 MR. DALY: We were told we couldn't. They wanted us
22 to work through them, so they told --

23 THE COURT: Excuse me, excuse me, excuse me. I have
24 been doing this case ad nauseam for nine years. I'm always
25 here. I took one week at Christmas, okay? When you were angry

1 because of the deliberative process privilege, you got my full
2 attention, and I personally went through the documents. So you
3 are very effective in getting my attention. So if you thought
4 they were being improper, why didn't you move to compel?

5 MR. DALY: We were told this is all there was, Judge.

6 THE COURT: Excuse me. Now I've got a disputed issue
7 of fact between attorneys. Let me just ask point-blank: Have
8 you subpoenaed the carriers?

9 MR. DALY: I'll let Mr. Torborg handle this.

10 MR. TORBORG: We issued a document to us, and we
11 actually talked -- I talked with Justin, I believe, or maybe it
12 was Andy Martinez, I can't remember --

13 THE COURT: I'm just not hearing you.

14 MR. TORBORG: I was the one who was in charge of that.
15 We were told, work through us for the carriers. There is
16 correspondence back and forth between Justin and I that talked
17 about this where I specifically said, "You'd better be
18 producing to us all the arrays that you're going to rely upon
19 in this case."

20 THE COURT: Well, they didn't.

21 MR. TORBORG: I never heard anything about we're not
22 going to go --

23 THE COURT: -- to their detriment, if I throw out
24 parts that were Daubert, but they've done that. Have they ever
25 said that they're destroyed?

1 MR. TORBORG: They have never said -- I believe what
2 was said is, "You have all we have."

3 THE COURT: Well, that may be true.

4 MR. TORBORG: And --

5 THE COURT: But they never --

6 MR. TORBORG: We were never told, "We're not going to
7 bother going to these other carriers." They told us to work
8 through them. They didn't want us to work through the
9 carriers.

10 THE COURT: I don't have the record to show they're
11 destroyed at this point. Now, what about the states?

12 MS. REID: Your Honor?

13 THE COURT: Now, maybe I'll let you subpoena them to
14 trial or before trial, I mean, if we could get there, but I
15 just don't have that record. What about the states? I believe
16 Mr. Daly said something along the lines that in certain
17 30(b)(6) depositions, the states said that some of the
18 documents were no longer there? Is that true for some of the
19 states?

20 MR. DALY: Certainly, Judge, in terms of both
21 documents, e-mails, correspondence, and then I'll let
22 Mr. Torborg and Ms. Reid talk about --

23 THE COURT: Well, he's essentially got two defenses to
24 that. One is, "We don't have the authority to instruct the
25 states. We can at best request." And the second is, "And, in

1 any event, there's no proof that this data is destroyed," as
2 opposed to archived, warehoused, or the states just saying "Too
3 big a burden, we're not doing it."

4 MR. TORBORG: There is 30(b)(6) testimony where
5 defendants asked the state officials, "Did you set, for
6 example, a MAC on this drug, and how did you get to that?" And
7 they say, "I don't have the data to tell you that." How is it
8 that if it's not --

9 THE COURT: Okay, so they said that they don't have
10 the data because they didn't bother looking for it, and it's in
11 an archived warehouse, or because it's been destroyed?

12 MR. TORBORG: I believe they said, "We don't have the
13 data." That's what we were told.

14 THE COURT: So you need to give -- I mean, if it's
15 been destroyed, that's different from the person sitting there
16 doesn't have the data, it's sitting in a warehouse, like
17 Indiana Jones, you know, some big thing with the boxes, you
18 know.

19 MS. REID: Your Honor?

20 THE COURT: Yes, do you have any --

21 MS. REID: Well, if I could just mention because Dey,
22 again, very similar to Mr. Torborg, Dey requested the Medicaid
23 claims data because we wanted our expert to analyze it at the
24 states claims level. I worked with Ms. Oberembt at the
25 Department of Justice. For a period of time of the discovery,

1 a year, a year and a half, she kept producing what data that
2 was coming in and said to work with her. At some point in the
3 fall before the discovery cutoff, she advised, perhaps around
4 September, there was no more data coming that CMS would be
5 producing. At that point we had received some states' claims
6 data, though not complete, for some 32 of the states. They
7 were not complete.

8 THE COURT: No, but --

9 MS. REID: But then, I want your Honor to understand,
10 we then subpoenaed claims data for 38 states. We ultimately
11 received data from 13.

12 THE COURT: Wait, wait. State by state?

13 MS. REID: State by state. We issued subpoenas.

14 THE COURT: Okay.

15 MS. REID: And, you know, I can go through, if you
16 want to know, what was produced by the DOJ, what states
17 responded to the subpoena, what was complete, what was
18 incomplete about that claims data.

19 THE COURT: The ones that were incomplete, for
20 example, did they say it's because it's overly broad and
21 burdensome, or did they say it's because it's been destroyed
22 pursuant to a document retention policy?

23 MS. REID: What realistically happened is, the states
24 said, "We'll produce what we have," and they produced it for
25 those states that did produce. There were some states that

1 moved and objected, and the subpoenas were quashed.

2 THE COURT: I just am not sure I've got a destruction
3 case yet, if one exists at all. Maybe there's one or two
4 states where in a 30(b)(6) they said that they destroyed them
5 and they don't exist anymore. I'd have to see that. I do
6 think that there may be some document retention requirements in
7 the earlier, like, earlier than 2004, but I'm just not -- I'm
8 hearing uncertainty in the record as to whether things were
9 actually destroyed.

10 MS. REID: Your Honor, I think that the point that
11 Mr. Torborg alluded to is, particularly on the state MAC
12 programs, that data is just gone. I mean, for whatever reason,
13 it's not there for many of these programs. The states' claim
14 data, they gave what they could. Dey actually paid for the
15 cost of the copying and production for what we could get. But
16 the reality is, you know, I think it's gone. I think that if
17 there had been a litigation hold put in place back when people
18 knew that these lawsuits were indeed likely to be brought --
19 and I respectfully submit Dey is in the same situation as
20 Abbott with the white paper in 2000 -- that this data would
21 have been preserved.

22 THE COURT: Well, I forget, there are various
23 complaints, right, along the way? When did you get sued?

24 MS. REID: The qui tam against us was '97, and then we
25 were part of the white paper that Mr. Daly has already

1 described.

2 THE COURT: You were part of the white paper.

3 MS. REID: Yes, and I will sit down.

4 MR. DRAYCOTT: A couple of points just for
5 clarification.

6 THE COURT: Let me ask you this: It sounds like you
7 certainly agree that you had some obligation with respect to
8 the carriers. It was probably earlier than 2004, which is the
9 duty to retain. But what you're saying is, you think it still
10 exists. Well, it may be some colossal misunderstanding here.

11 MR. DRAYCOTT: That's right, your Honor, but I want to
12 be clear. We did, and just so there's no confusion, we did --
13 and Mr. Torborg is right about one thing, which is that we
14 undertook an obligation to produce on behalf of the carriers,
15 and the carriers were certainly directed to search. But at the
16 earliest point in this litigation, when a 30(b)(6) deposition
17 was taken of the carrier which was specifically directed at
18 looking at what search they did, the testimony from the
19 30(b)(6) deponent was that they weren't required to go to their
20 archives; and that, you know, is a significant issue. And
21 there's been other carrier testimony where the deponents have
22 testified simply they don't know -- when there were questions
23 specifically about the arrays, they simply hadn't looked for
24 that material in the archives. So that was early 2007. In
25 other words, years ago there was a clear indication that while

1 we had undertaken a production obligation on behalf of the
2 Medicare carriers, we made it very clear as to what burdens we
3 weren't going to impose on those carriers. And not only did
4 we state it --

5 THE COURT: Where is that in my record? Truthfully,
6 this was briefed in a way that it almost is irrelevant to the
7 issues. I know there's a -- factually --

8 MR. DRAYCOTT: That's because the government's
9 argument principally with respect to things like the arrays, if
10 there's been any prejudice from the lack of evidence, whatever
11 its source --

12 THE COURT: Your real argument is, "Yes, we have it,
13 but they didn't move to compel."

14 MR. DRAYCOTT: Our evidence is that if there is any
15 prejudice from a lack of information from the carriers such as
16 arrays, that that's been a prejudice to the United States,
17 because we have directed our experts to use the information
18 that was available because it's been laid out very clearly.

19 THE COURT: Right. So they're saying they think that
20 most of it exists. Is that right?

21 MR. DRAYCOTT: Your Honor, I certainly am not going to
22 say that I can tell you what's in carrier archives. I can't
23 make that representation to your Honor. What I am saying to
24 you is that in the context of the expert reports, that we --

25 THE COURT: All right, can I --

1 MR. DRAYCOTT: And with respect to what's been
2 destroyed, we would say that they haven't met their burden of
3 demonstrating that there has been actual destruction through
4 spoliation, as opposed to the information not being
5 available --

6 THE COURT: So you think this is more properly
7 resolved as a discovery dispute.

8 MR. DRAYCOTT: Well, what I said in the briefs, your
9 Honor, is absolutely, with respect to the claims data, with
10 respect to the claims data, and I would also include the
11 carrier arrays, that that should be resolved in the context of
12 the expert's testimony. And, again, I think Dr. Duggan --

13 THE COURT: Do you agree they're entitled to that?

14 MR. DRAYCOTT: They were entitled to at least try to
15 contest our burdensomeness argument three years ago --

16 THE COURT: So and it was your understanding that it
17 didn't exist at all? Is that what --

18 MR. DALY: Yes, that's what we understood, Judge, I
19 mean, when we said "Give us the arrays" and they give us
20 partial arrays, you know, a few quarters. You know, Michigan,
21 they give five quarters of eight over ten years.

22 THE COURT: Well, they're now saying -- I don't think
23 I have the evidentiary basis to say that they've been
24 destroyed, these arrays, or, for that matter, with the states.
25 Where I'm a little caught is if this was based on some colossal

1 misunderstanding --

2 MR. DRAYCOTT: Your Honor, with respect to
3 understanding, the deposition of First Coast Service Options,
4 in response to a question from Abbott counsel regarding whether
5 there were arrays from 1991 to 1994, the carrier deponent said,
6 "I'm not saying there aren't any, but they were possibly in
7 storage. We didn't pull everything out of storage." So they
8 were told that there may be arrays in storage that they weren't
9 looking for by a carrier deponent. And that was just one
10 deposition. So it was clear that -- I mean, the arrays, what
11 arrays we had was absolutely patent from what we were
12 producing, and there's no really dispute or misunderstanding.
13 And that was what Dr. Duggan was relying on. Certainly the
14 first report that we issued I think was 2008 with respect to
15 Abbott by Dr. Duggan.

16 So the method -- what's been abundantly transparent
17 is, first of all, what our productions have been, what we are
18 producing, what our expert's relying on. So this has been out
19 there, and we have made it very clear that there is certain
20 areas where the burden of production is the reason we're not
21 going to look for that data, and we have to live with the
22 consequence of that with respect to Dr. Duggan's --

23 THE COURT: All right, so they're saying there's no
24 evidence it's been destroyed.

25 MR. DALY: Well, even what Mr. Draycott just said, I

1 mean, that doesn't say that it's not destroyed. The person
2 doesn't know. We understood that --

3 THE COURT: No, no, no, no, I'm not going to find
4 there's a spoliation issue if it's not destroyed. I don't have
5 any idea if it's destroyed. It's not been produced. That's
6 what's happened. So I don't know whether it should have been
7 produced or wasn't produced. Maybe you can subpoena it all to
8 trial.

9 MR. DALY: In terms of the claims data, it's either
10 gone, destroyed, or they -- what we're hearing today is -- when
11 we had the Duggan hearing, Dr. Duggan is telling us, "Well, you
12 know, I didn't have the stuff. That's all that was available.
13 That's why I had to do all this extrapolation."

14 THE COURT: Right.

15 MR. DALY: Now we're hearing that the government
16 apparently chose to go with a snippet, 5 percent of the --

17 THE COURT: That may be, and it may come back to bite
18 them. I am simply saying it's not a spoliation issue.

19 MR. DALY: But I do want to make one point, Judge.
20 There's more to it than the claims data here. What happened
21 here is, the spoliation is of e-mails, of documents, of files,
22 of everything. We in our briefs, for example, in their
23 response to interrogatories, "Give us people with knowledge
24 about policy within CMS," they gave us thirty-three people.
25 Twenty-eight of them were former employees. Twenty-seven of

1 the twenty-eight we deposed, and all of their e-mails had been
2 destroyed. So they made no attempt --

3 THE COURT: Okay, okay, excuse me. So I deny the
4 spoliation with respect to damages at this point because I
5 don't have evidence that there's been spoliation. Now I did
6 see in the attachments Mr. Daly gave me that starting in the
7 tail end of 1999, 2000, at least at the federal -- is it the
8 federal level where there's a "Destroy every e-mail after 180
9 days"?

10 MR. DRAYCOTT: No. Your Honor, that was an e-mail
11 from a New York state official --

12 THE COURT: All right, New York.

13 MR. DRAYCOTT: -- who didn't for a minute say destroy
14 everything. And what New York did, and the witness testified
15 to this, is they produced over 25 boxes of documents. And this
16 was in 2006 when he sent the e-mail, he said, you know, "Let's
17 learn --"

18 THE COURT: No, no, no, I think I'm thinking about
19 something else. Hold on. "CMS's document retention policy
20 routinely destroyed documents," dated January 29, 1999. "This
21 is an early warning that on February 12, 1999, Getco will begin
22 deleting e-mail messages older than 180 days." It's probably a
23 pretty standard one, so --

24 MR. DRAYCOTT: But, again, I think it's good to try to
25 get these materials in categories. The policy of the agency

1 was, e-mails are to be printed out as a record of the agency.
2 A hard copy is made, and indeed from the production and the
3 litigation in this case, we concede that that is a policy that
4 was adhered to and e-mails going back decades -- well,
5 certainly back into the '90s -- well, I shouldn't say that.
6 Certainly we've gotten e-mails been produced. So with respect
7 to the hard drive, there was an issue about preservation of
8 hard drives. There was a policy that ultimately those are
9 ultimately erased, but the direction is that you print out and
10 preserve the material on the hard drive.

11 THE COURT: I see.

12 So, listen, this is what I'm going to do: I'm denying
13 the motion on spoliation. I don't have any evidence that
14 things are actually destroyed that were relevant. If that
15 should come up as we hit trial, certainly I'll have to deal
16 with it. If, for example, you subpoena stuff to trial and it
17 isn't there, I may have to readdress the issue, but at least
18 right now, I don't have evidence that it's gone as opposed to
19 in a warehouse, or I don't have a recalcitrant state. I don't
20 know what happened.

21 MR. DALY: I understand what you're saying with
22 respect to the claims data, Judge, but we do have a lot to say
23 about e-mails and documents, both at the state and federal
24 level. I mean, twenty-seven of twenty-eight people's documents
25 were destroyed. Tom Scully left the government, and we have

1 evidence that's in the slides as well where at the direction of
2 CMS attorneys, his hard drive was destroyed. Here's a guy who
3 was at the head of Medicare --

4 THE COURT: Well, maybe you get an adverse inference
5 at trial, I don't know, but at this point I don't know enough
6 about why it matters. Like, Scully we know to death. I mean,
7 we've got so much on Scully. The least problematic were the
8 federal files because we have so much on that. I don't know
9 enough about individual state files, as you say.

10 MR. DALY: Well, we have cataloged a lot of this in
11 the papers, Judge.

12 THE COURT: But I don't even know what a remedy would
13 be. In other words, the remedy I was thinking of possibly was
14 the extrapolation issue, but we don't even know that they're
15 destroyed, so I don't know what remedy you want at this point.
16 I don't know what I would say.

17 MR. DALY: Well, I think the first step is a finding
18 of spoliation with respect to those issues, is the first step
19 in the analysis, and I don't think there's any question about
20 it. Mr. Draycott --

21 THE COURT: I'd be speculating about prejudice. I
22 just would be speculating. I know what the prejudice is on the
23 damage data. That I could have figured out. That's what I
24 came in here thinking about, actually, because that's where the
25 focus of so much of this has been. I don't know what the

1 damage would be. Let's assume they should have issued some
2 sort of order in 2000, and if they had, maybe the states would
3 have complied, and maybe they wouldn't. I don't know what was
4 produced and what wasn't. I'd be guessing. I have no idea
5 what to do.

6 MR. DALY: We would like to at least have what they
7 say that they directed the states to do. You asked
8 Mr. Draycott about that. I don't think he answered the
9 question.

10 THE COURT: Do you have the letter that you sent out
11 to the states in 2004 or 2006?

12 MR. DRAYCOTT: Well, certainly the letter from the
13 Department of Justice was 2006. But, your Honor, my
14 understanding is that our whole argument is, that was way too
15 late anyway, so I'm not sure where the letter gets them.

16 THE COURT: Well, give it to them.

17 MR. DRAYCOTT: Okay.

18 THE COURT: Okay? Give it to them, whatever you sent
19 to the states. And then if there's any information when
20 Mr. Henderson goes through his files, to the extent they exist,
21 or any of the members of your team do, that you know certain
22 data was destroyed, let me know, because right now it's too
23 speculative. I have no idea what I'm talking about. I mean, I
24 don't even have clean evidence from you as to what I'm talking
25 about. I may backdate it in terms of the duty to preserve if

1 in fact -- I'm not going back to 1995. Maybe I'd go to when
2 you demanded it in 2000. Maybe I'd go to late 1999. I'm not
3 sure that matters. I don't know.

4 You say that you can't force the states. That may
5 well be true. To the extent there's something in -- but I
6 don't even know what the underlying facts are. I feel like I'm
7 swimming upstream here a little bit. They say that some data
8 was destroyed. It's intuitive that some data was destroyed,
9 but I don't know if it's data that mattered.

10 So at this point it's denied without prejudice.
11 You'll see where we come back from, and in the meantime, you
12 have to make certain decisions about whether you want to
13 subpoena the stuff to trial.

14 MR. DALY: I will, Judge. The other thing in terms of
15 a remedy in terms of thinking about the future, though, would
16 be what I was talking about in terms of the inference and the
17 burden. I mean, we do have -- in terms of what we said in the
18 brief, Judge, there's a lot of stuff from the states:
19 testimony, lack of documents, lack of e-mails, and from the
20 federal government, lack of e-mails, bad memories because they
21 don't have their own documents that would have refreshed their
22 recollection and allowed them to testify to the things that we
23 wanted to find out from them. That kind of spoliation, that
24 kind of delay in getting holds out, even within the federal
25 government, let alone the states, I think entitles us to

1 perhaps either a burden-shifting, or, as the Court has already
2 observed, perhaps some kind of adverse inference situation.

3 THE COURT: If I find out things have been destroyed.
4 I'm not even there yet. So I don't know if things have been
5 destroyed, when they were destroyed, or why it matters. So
6 that may be something we would brief in the context of a motion
7 in limine or something, you know, like -- because I think
8 this -- I've read so much briefing and I've read it over the
9 course of a couple of weeks, so excuse me, but much of the
10 briefing was not on point to this. So it's without prejudice,
11 and I'll deal with it in a motion in limine as to what I say
12 about it, all right, so far.

13 So you give him the letter. You check and see if you
14 know what's been destroyed. At least I'll know what has been
15 destroyed to the extent the government knows about it. Maybe
16 you'd go back through and try and figure out what has been
17 destroyed.

18 MR. DRAYCOTT: Just with respect to the states?

19 THE COURT: Well --

20 MR. DRAYCOTT: Communications, if any, between Mr. --

21 MR. HENDERSON: As I understand your Honor's
22 instructions, you want to know what our records indicate, what
23 we can reconstruct as to state claims data and whether or not
24 it was destroyed, if we have knowledge of destruction of states
25 claims data.

1 THE COURT: Yes. And I guess you're going to have to
2 figure out what to do about these -- I'm not reopening
3 discovery because motions to compel could have been filed and
4 that sort of thing, but that doesn't prevent them from
5 subpoenaing it at trial. So that's a pretty -- you may prefer
6 to deal with the blank spaces. I don't know. Right now the
7 Daubert, though, is only on what I have. I'm not reopening the
8 record on that.

9 MR. REALE: Your Honor, just one small point.
10 Depending on how our trial shapes up, if it's a Medicare or
11 Medicaid only, assuming for a minute that there is a Medicaid
12 component, what we'd ask for, if we're going to subpoena the
13 states for this data for a Medicaid trial, that we have in
14 advance not just a model letter but the actual letter that went
15 out to each state so that can be part of our discussion.

16 THE COURT: Yes, absolutely.

17 MR. REALE: Thank you, your Honor.

18 THE COURT: Absolutely. That would be fine. Thank
19 you.

20 MS. REID: Your Honor, I'm sorry, but is it possible
21 to get the 2004 whatever that hold is that they rely on --

22 THE COURT: Yes. Just give them copies of whatever
23 you sent out to people, 2004, 2006. Whatever you mailed to the
24 states or the carriers give to them.

25 MR. DRAYCOTT: The states or carriers, okay, your

1 Honor.

2 THE COURT: The states or carriers.

3 MS. REID: And CMS?

4 THE COURT: Yes, sure. The holds, the holds. Okay.

5 MS. REID: Thank you, your Honor.

6 THE CLERK: Court is in recess.

7 (Adjourned, 11:15 a.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 58 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action Nos. 01-12257-PBS
and 06-11337-PBS, In Re: Pharmaceutical Industry Average
Wholesale Price Litigation, and thereafter by me reduced to
typewriting and is a true and accurate record of the
proceedings.

In witness whereof I have hereunto set my hand this ^ day
of 31st day of January, 2010.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
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